1978

Department of Registration of Department of Regulation of the State of Utah v. Jeff Stone et al : Brief of Appellants

Utah Supreme Court

Robert M. McRae; Loni F. DeLand; Attorneys for Defendants-Appellants;
Robert B. Hansen and Leon A. Halgren; Attorneys for Plaintiff-Respondent;

IN THE SUPREME COURT

OF THE

STATE OF UTAH

DEPARTMENT OF REGISTRATION OF DEPARTMENT OF REGULATION OF THE STATE OF UTAH,	:	
Plaintiff-Respondent,	:	
vs.	:	Case No. 15711
JEFF STONE and/or LAKEWOOD ENTERPRISES, INC., dba NEO-DENTURE CLINIC,	:	
Defendants-Appellants.	:	

APPELLANTS' BRIEF

Appeal from a Judgment of the Third Judicial District Court
In and For Salt Lake County, Utah
The Honorable Stewart M. Hanson, Jr., Judge

McRAE AND DeLAND
Robert M. McRae and
Loni F. DeLand
72 East Fourth South, Suite 355
Salt Lake City, Utah 84111
Attorneys for Defendants-
Appellants

UTAH ATTORNEY GENERAL
Robert B. Hansen and
Leon A. Halgren
State Capitol Building
Salt Lake City, Utah 84114
Attorneys for Plaintiff-
Respondent

IN THE SUPREME COURT

OF THE

STATE OF UTAH

DEPARTMENT OF REGISTRATION OF DEPARTMENT OF REGULATION OF THE STATE OF UTAH,	:	
Plaintiff-Respondent,	:	
vs.	:	Case No. 15711
JEFF STONE and/or LAKEWOOD ENTERPRISES, INC., dba NEO-DENTURE CLINIC,	:	
Defendants-Appellants.	:	

APPELLANTS' BRIEF

Appeal from a Judgment of the Third Judicial District Court
In and For Salt Lake County, Utah
The Honorable Stewart M. Hanson, Jr., Judge

McRAE AND DeLAND
Robert M. McRae and
Loni F. DeLand
72 East Fourth South, Suite 355
Salt Lake City, Utah 84111
Attorneys for Defendants-
Appellants

UTAH ATTORNEY GENERAL
Robert B. Hansen and
Leon A. Halgren
State Capitol Building
Salt Lake City, Utah 84114
Attorneys for Plaintiff-
Respondent

TABLE OF CONTENTS

CASES CITED

STATUTES CITED

IN THE SUPREME COURT

OF THE

STATE OF UTAH

DEPARTMENT OF REGISTRATION OF DEPARTMENT OF REGULATION OF THE STATE OF UTAH,	:	
Plaintiff-Respondent,	:	Case No. 15711
vs.	:	
JEFF STONE and/or LAKEWOOD ENTERPRISES, INC., dba NEO-DENTURE CLINIC,	:	
Defendants-Appellants.	:	

APPELLANTS' BRIEF

STATEMENT OF THE NATURE OF THE CASE

This is an appeal from a conviction for contempt of court on 120 separate violations of a temporary restraining order wherein appellants had been enjoined from engaging in the practice of dentistry without a license.

DISPOSITION IN LOWER COURT

The case was tried to the court. From a verdict of guilty the defendants-appellants appeal.

RELIEF SOUGHT ON APPEAL

Appellants seek a finding that the sentence as i
posed by the court below was illegally imposed and thereby
invalid or, in the alternative, that said sentence be remi
to $100.00 fine and one-half of one day in jail.

STATEMENT OF FACTS

On August 4, 1977 this Court, in the case of Sto
et al., v. Dept. of Registration, State of Utah, ____ P.2d
____, Supreme Court of Utah, number 14867, ruled that Sect
58-7-6, Utah Code Annotated, 1953 was constitutional and t
practicing dentistry, as defined by said statute, included
acts of offering or undertaking . . . "to supply artificia
teeth . . . or to take impressions of the teeth or jaws . .
(i.e., "denturism")".

On October 13, 1977 plaintiff-respondent filed a
Petition in the Third Judicial District Court of Salt Lake
County requesting a preliminary restraining order against
appellants, alleging that they were practicing dentistry wi
out a license as defined in Section 58-7-6, Utah Code Annot
1953. (R. 2-4)

On October 4, 1977 the Honorable Marcessus K. Sno
of that above entitled court issued a preliminary restrain
order enjoining appellants from engaging in said activity a
set October 25, 1977 for a hearing on the matter pursuant t
an Order to Show Cause. (R. 5-6)

On October 26, 1977 said matter on Order to Show Cause came before the Honorable David B. Dee of the same above entitled court whereupon the court continued the restraining order in full force and effect as against appellants pendente lite. (R. 14, 15)

On January 20, 1978 respondent filed a Verified Petition alleging that appellants were in willful disobedience of the October 26th restraining order. Pursuant to said Verified Petition appellants were ordered to show cause why each of them should not be found guilty of, and punished for, contempt of court for violations of Section 58-7-6, Utah Code Annotated, 1953. (R. 23-25, 31-32)

The matter was heard on February 23, 1978 by the Honorable Stewart M. Hanson, Jr.

At the termination of the hearing on February 23, 1978, the court entered its Order as reflected by the Minute Entry herein adjudging the defendants guilty of contempt, and sentenced the individual defendant to one-half day in jail for each of the 120 acts of contempt found to have occurred since the temporary injunction entered and fining the corporate defendant $100.00 per act of contempt which, according to the Minute Entry, is sixty days in jail and $12,000.00 respectively. (R. 38)

ARGUMENT

POINT I

THE ORDER OF THE COURT BELOW IS INVALID IN THAT

SENTENCES IMPOSED WERE CONSECUTIVE RATHER THAN CONCURRENT.

The court below sentenced the individual defendan to one-half of one day for each of 120 violations of its re- straining order, each violation apparently representing the estimated 120 number of impressions undertaken by defendants between the October 26th order and the February 23rd findin of guilt. Since the cumulative sentence is sixty days in th county jail then the sentence is necessarily consecutive ra than concurrent; likewise, the $100.00 fine per corporate vi lation is cumulative since the total fine imposed by the cou was $12,000.00. (R. 48-50, 52-53)

All acts committed by appellants, if contemptuous, were closely related in time and were an accomplishment of a single objective, i.e., a "single criminal episode", as defi by Section 76-1-401, Utah Code Annotated, 1953; therefore th provisions of Section 76-3-401, Utah Code Annotated, 1953 ap said provisions providing for consecutive sentences only in case of felonies and contempt must necessarily be classified a misdemeanor considering its limitations on punishment and place of confinement.

This Court in McCoy v. Severson, 118 U.502 held th when a person was convicted of separate crimes and several te of imprisonment were imposed at the same time, the sentences were to run concurrently, in absence of a special court dire or statute to the contrary.

In Beck v. Frontier Airlines, 174 Neb. 172, 116 N.W. 2d 281, the Supreme Court of Nebraska ruled that where a series of acts constitutes but one contempt of one court order there cannot be punishment for each successive act. In Beck the airline had been ordered to continue flights between two cities in Nebraska and disobeyed the court's order.

The most celebrated cases of this type, of course, involve the numerous Smith Act trials in the 1950's. In Yates v. United States, 355 U.S. 66, 2 L.Ed 2d 95, and its progeny, the courts imposed a sentence for contempt for each and every refusal to answer a specific question by the prosecutor. In Yates the witness was asked eleven consecutive questions concerning her knowledge of communist party membership of others and she refused to answer each question. The court found her guilty of eleven counts of contempt with the sentences to run concurrently. The Supreme Court overturned ten of the eleven convictions, holding that a finding of contempt for more than one refusal was an improper multiplication of offenses.

The 3rd Circuit Court in U. S. v. Orman, 207 F.2d 148, held that separate refusals to comply with a court order (to produce documents) did not make the defendant guilty of contempt for each separate refusal.

Since contempt is a criminal offense the criterion for determining same is the same as for other crimes, i.e.,

"Is the intent and objective of the contemnor divisible or pursuit of one course of conduct?" That theory is followed the majority of jurisdictions, e.g., Codespoli v. Pennsylva 418 U.S. 506, 41 L.Ed 2d 912; In Re Ward, 51 Cal Rptr 272, C.2d 672, 414 P.2d 400, cert. denied 385 U.S. 923, 17 L.Ed 147.

> When an impulse is single, but one offense can be charged no matter how long the act may continue . . . The test is whether it is an individual act or acts which is prohibited or the course of action which they constitute. If it is the course of action which is prohibited there can be but one offense and one penalty. State v. Willhote, 40 N.J. Sup. 405, 123 A.2d 237.

Yet another test is articulated by the Louisiana Supreme Court. In Gautreaux v. Gautreaux, 220 La. 564, 57 2d 188, the court said the test is whether "the subsequent temptuous conduct is so interwoven with previous conduct th it is inseparable therefrom." At 192, 193.

This Court held in State v. Starlight Club, 17 U. 174, 177 that three successive fines of $2,500.00 (the maxi under the statute) imposed against a private liquor club fo three illegal sales of liquor on successive Friday nights t same undercover police team was excessive and this Court re the sentence to one fine of $2,500.00 only, and in doing so that the three undercover purchases of liquor, each seven d apart, were really "one episode designed to terminate defen charter, remove what someone thought to have been a loose o ation in violation of the statute, and that really but one

not three, was accomplished."

In the instant case we have acts, found to be contemptuous, which were carried out day after day in one ongoing business routine. The State did not prove 120 acts or three acts or 1,000 acts . . . only one 120-day period of noncompliance. If the acts of appellants are in fact contemptuous, then the fine of $100.00 and a one-half day's jail sentence, total, are sufficient and anything more is excessive.

Under any of the tests articulated by this Court or the other courts cited above, appellants have followed but one continuous course of conduct; one 120-day "act" of conducting a business inviolate (as defined) of the existing business regulations of the state, conduct which was in pursuit of one business objective at all times and consisted of the same type of conduct on the first day following the order as it did on the 119th day following the order.

POINT II

THE SENTENCE IMPOSED ON APPELLANT IS EXCESSIVE IN THAT IT BEARS NO REASONABLE RELATIONSHIP TO THE GRAVITY OF THE OFFENSE.

For practicing his trade, i.e., "denturism", if found by the courts to amount to a violation of Section 58-7-6, Utah Code Annotated, 1953, appellant Stone presumably could serve up to six months in jail; however, it is ludicrous to assume that such a sentence would be imposed in light of today's sentencing standards which normally call for suspended sentences for first

offenders even in felony cases. Misdemeanor offenses invol stealth, even violence, seldom result in jail sentences bei actually served.

In the instant case appellant Stone has hanging o his head a 60-day jail sentence for attempting to pursue a mon occupation of life; conduct which the State failed to s was injurious to the public health or welfare, indeed, not complaining patient was brought forward nor was any evidenc negligent or sub-standard workmanship on dentures.

In addition to appellant Stone's impending incarc ation there exists an imposed fine of $12,000.00 on a corpo appellant which, in reality, is a fledgling business with l resources.

In reality the court has imposed these stiff sent for violating the order of the court. Both the United Stat Supreme Court and the Utah Supreme Court have realized that must be a limit to the courts' discretion in punishing cont

> In contempt proceedings courts should never exercise more than the least possible power adequate to the end proposal. United States v. United Mine Workers, 330 U.S. 258, 91 L. Ed 884.

This Court, in Harris v. Harris, 14 U.2d 96, 377 1007, held that 30 days in jail was an excessive penalty wh a contemnor father had paid only $60.00 per month of a $100 per month child support decree. This Court admonished the courts of this State to exercise their power to punish for tempt "within the confines of reason and justice." At 100

Likewise, the Colorado Supreme Court has recognized the need for restraint when punishing contemnors. That court, in Shotkin v. Atchison, T & S.F.R.R. Co., 235 P.2d 990, held a 60-day jail sentence and a $1000 fine to be excessive where the contemnor had disobeyed an order enjoining him from instituting any further legal actions in court. The court strongly advised the state's trial courts to take all the circumstances of each case into account before sentencing for contempt convictions and that the punishment should be reasonably related to the gravity of the offense.

In a Georgia case a father had been punished for 238 separate acts of contempt, one for each day he kept his daughter out of the jurisdiction. The court held that even if each day could be separately punished, the total could not be excessive. (Kenimer v. State, 81 Ga. App. 437, 59 S.E. 2d 296.)

These appellants were not operating a fly-by-night quackery. This Court in the first Stone v. State case (supra) acknowledged that the appellant Stone was probably better trained to make dentures than a dentist. Appellants here are not asking this Court to consider whether the practice of denturism violates the statute but rather to consider whether the court below has exercised its power unreasonably in sentencing the appellant in this case in a manner which does not relate to the gravity of the offense committed by them.

CONCLUSION

At issue is whether a judge in a trial court sitt in Utah may sentence a contemnor for each individual act of contempt committed in furtherance of one single, albeit len criminal episode or continuous course of contemptuous condu with one single objective. The majority of courts, includi this Court, seem to say that such a multiplicity of penalti is invalid and therefore the sentence in the instant case m be vacated or, in the alternative, remitted to a sentence be a more reasonable relationship to the gravity of the offense involved.

RESPECTFULLY SUBMITTED this 11th day of May, 1978.

McRAE AND DeLAND

ROBERT M. McRAE
Attorney for Appellants

LONI F. DeLAND
Attorney for Appellant

CERTIFICATE OF DELIVERY

I hereby certify that I delivered four true and co rect copies of the foregoing personally to the office of the Utah Attorney General on this 11th day of May, 1978.